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IN THE

MISSOURI SUPREME COURT

STATE EX REL. RONNIE LUSK, Relator,	)	
v.	)	Case No. SC93541 Circuit Court No. 07N9-CR02026-01
THE HONORABLE MARK ORR, CIRCUIT JUDGE, 38TH JUDICIAL CIRCUIT Respondent.	)	

Original Proceedings for Writ of Prohibition

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT AGAINST A PERMANENT WRIT OF PROHIBITION

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STATEMENT OF FACTS

The facts of the case are, for the most part, not in dispute. Relator was placed on probation in the underlying criminal case for five years on February 14, 2008. (Rel. Ex. B p. A6). Respondent immediately entered an order suspending the Relator's probation until he was to be "released from DOC." (Rel. Ex. B p. A8). On July 9, 2013, Respondent entered an order reinstating Relator's probation. (Rel. Ex. A p. A8). On March 18, 2011, Relator was transported to the Missouri Department of Corrections (DOC) on Case No. 08SD-CR02244-01. (Rel. Ex. A p. A2). On March 24, 2011, the Respondent issued a warrant and on April 14, 2011, the State filed its Motion to Revoke Probation and to Toll the Probation Period. (Rel. Ex. B p. A11). On January 30, 2012, the Relator sent a letter to the Respondent, from DOC, asking that the warrant be lifted. (Rel. Ex. D p. A19-A20). On November 26, 2012, DOC alerted Taney County authorities to the Relator's imminent release and was told that Taney County authorities would pick the Relator up at the local Probation & Parole office rather than extraditing him from DOC. (Rel. Ex. A p. A2). Relator was released on November 30, 2012. (Rel. Ex. A p. A3). On December 3, 2012, Relator reported to his probation officer but was not taken into custody at that time. (Rel. Ex. p. A29). On January 17, 2013, the Relator was declared to be an absconder from supervised probation, a fact that the Relator neglects to mention in his petition, but is present in his violation report from April 17, 2013. (Rel. Ex. F p. A28). The Relator was finally arrested, while absconding from probation, by the New Madrid Police Department on March 31, 2013. (Rel. Ex. F p. A29). On April 18, 2013, the warrant from the Respondent's court was finally served on

Relator. (Rel. Ex. B p. A29). Relator, through counsel, filed a Motion asking the Respondent to discharge him from probation, which was denied. (Rel. Ex. E p. A21-A26). A probation violation hearing was scheduled for June 26, 2013 but was reset to July 11. (Rel. Ex. B p. A12). The Relator filed a Petition for Writ of Prohibition, which was summarily denied by the Missouri Court of Appeals, Southern District on July 9, 2013. (Rel. Ex. G p. A31). On July 9, 2013, Relator petitioned this Court and received a preliminary writ of prohibition.

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POINT RELIED ON

Relator is not entitled to a writ of prohibition prohibiting the Respondent, the Honorable Mark E. Orr, from revoking Relator's probation because Respondent has the authority to revoke his probation in that (1) every reasonable effort was made to conduct the probation revocation hearing and any delay was out of the control of the Respondent, (2) that Respondent's delay in holding a probation revocation hearing was reasonable and not unduly prejudicial and (3) the Relator was aware of the revocation and had several opportunities to resolve the issue by failed to do so.

***Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006)**

***State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. S.D. 2008)**

***Williams v. State*, 927 S.W.2d 903 (Mo. App. S.D. 1996)**

Section 559.036 RSMo. (Supp. 2012)

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ARGUMENT

Relator is not entitled to a writ of prohibition prohibiting the Respondent, the Honorable Mark E. Orr, from revoking or holding a probation revocation hearing. The Respondent has not lost jurisdiction over the Relator's case because the Respondent and the State have complied with all of the requirements of Section 559.036[1], in that every reasonable effort was made to hold the revocation hearing, any delay in holding the probation revocation hearing was not due to the Court or the State's own actions, and finally that the delay in holding a probation revocation hearing was not unreasonable or prejudicial.

"The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. banc 2012). A writ of prohibition is also appropriate to determine whether a trial judge has abused his discretion. *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 257-258 (Mo. banc 2002). This Court "issued a preliminary writ of prohibition to determine whether the trial judge abused her discretion in refusing to accept Adrian Kinder's attempted waiver of a potentially serious conflict of interest." *Id.* In this case, the Respondent agrees that a writ of prohibition is an

[1] All statutory references, unless otherwise stated, are from RSMo Supp. 2012.

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appropriate remedy if one was needed, however, the Respondent does not believe he has exceeded his authority or jurisdiction in this matter.

Respondent concedes that suspending the Relator's probation does not serve to extend his term of probation, nor does the issuance of a capias warrant – this is settled law and has been litigated in this Court and in the Court of Appeal several times. Even so, the record is clear that the Respondent made every reasonable effort to conduct the probation revocation hearing and that the Relator's current situation was self-inflicted and outside of the control of the Respondent.

EVERY REASONABLE EFFORT WAS MADE TO CONDUCT THE PROBATION REVOCATION HEARING AND ANY DELAY WAS OUT OF THE CONTROL OF THE RESPONDENT

When a trial court affirmatively manifests its intent to conduct a probation revocation hearing within the five-year term of probation, it is not necessary that a formal motion be filed to initiate that revocation and, furthermore, it is not necessary for that hearing to occur inside the five year period. *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471, 473 (App. S.D. 1992). The burden of proof is on the probationer to show unreasonable delay in conducting a revocation hearing and to do so, the probationer must show that is ready and willing to proceed at an earlier date. *Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006). While Relator apparently concedes that Respondent satisfied the first requirement of Section 559.036.8, in that an affirmative manifestation of intent to conduct a revocation hearing was made by the State's filing of a "Motion to Revoke" and the Respondent's issuance of a capias warrant, Relator claims that the

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Respondent did not make every reasonable effort to hold the probation revocation hearing because Taney County representatives did not pick him up from DOC. Respondent contends that the Court made all reasonable efforts to have the hearing before the expiration of the Respondent's probation and any delay was due to the Respondent's status as an absconder from supervision.

Although there are no cases with this exact fact pattern, the jurisprudence generated by the appellate courts of this State support the Respondent's position. In the *Williams* case, the Movant was placed on a five year probationary period in April 1986. *Williams v. State*, 927 S.W.2d 903, 904 (Mo. App. S.D. 1996). The Court in that case issued a capias warrant in July of that year after the Movant absconded from probation and made a docket entry directing that the "warrant not be entered in N.C.I.C."[2] *Id.* at 904. Additionally, the Court, knowing where the Movant's parents were located, did not contact them in an effort to locate the Movant so that a probation revocation hearing could be held. *Id.* at 906. The Movant was finally apprehended in 1993, which would have been after his probation expired, a probation revocation hearing was subsequently held and a sentence in the Department of Corrections was executed. *Id.* at 905. The Movant subsequently filed a Motion for Post Conviction Relief, arguing that the Court did not have jurisdiction to revoke his probation and order his sentence executed, as the Court failed to manifest an intent to revoke his probation and did not make all reasonable efforts to hold a revocation hearing, citing the Court's docket entry directing the warrant to not be entered into the N.C.I.C. and the Court's failure to contact the Movant's parents

[2] N.C.I.C. is the National Crime Information Center.

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as evidence of the Court being unreasonable in its efforts to conduct such a hearing. *Id.* at 905. Both the motion court and the Southern District denied the Movant's motion (and subsequent appeal), stating that notifying the Movant of a hearing date was not possible until he was taken into custody and that the trial court took the only action possible under the circumstances. *Id.* at 906. The Southern District, in support of its opinion, even cites *State ex rel. Limback v. Gum*, which the Relator has cited in his Petition.

The facts of that case have *some* similarities with the instant case. In the instant case, a capias warrant was issued by the Respondent on March 24, 2011 and a Motion to Revoke Probation was subsequently filed by the State on April 6, 2011. The warrant was reported as having been "served" on the Relator while he was in the Department of Corrections, but was subsequently purged from MULES[3] for reasons unknown to the parties. (Rel. Ex. F, p. 28). At the time that warrant was issued, the Relator was considered to be an absconder from supervision, similar to the Movant in the *Williams* case. (Rel. Ex. F, p. 28). In fact, the Relator had been transported twice from other places throughout the State while he was absconding from his probation and the Court had already incurred substantial expense transporting the Relator. (Rel. Ex. B, p. 10-11). Furthermore, rather than coming to the Taney County Judicial Center to take care of the warrant, which the Relator knew existed based on his own exhibits (Rel. Ex. D), the

[3] MULES is Missouri's Uniform Law Enforcement System, which is where warrants and criminal histories are made available to law enforcement agencies throughout the state. It is similar in nature to the N.C.I.C.

Relator **once again** absconded from probation and parole after being released from the Department of Corrections on his other criminal cases. A hearing could not possibly be conducted between the time he absconded in January 2013 and the time he was apprehended in April because the Respondent did not know where the Relator was and notice could not be given of any potential probation revocation hearing.

RESPONDENT'S DELAY IN HOLDING A PROBATION REVOCATION HEARING WAS REASONABLE AND NOT UNDULY PREJUDICIAL

The three month delay from the alleged end of the Relator's probationary period and the time the Relator was served with the capias warrant for his arrest and the scheduling of his probation revocation hearing was not prejudicial and was a reasonable delay. In support of his argument, the Relator cites a case in which the court essentially extended the term of probation by over three years. *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 110 (Mo. App. S.D. 2009). The Southern District in that case held that the **three year** gap of time was unfairly prejudicial to the Relator, as his probation expired in 2005, a revocation hearing was not held until 2008 and the Relator was given numerous appearances before the Court. *Id.* at 110. Generally speaking, a delay in holding a probation revocation hearing will be unduly prejudicial when the Court has had opportunities to conduct a timely revocation hearing but fails to do so. *State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. S.D. 2008). In the instant case, the Relator was placed on probation for five years beginning in 2008 with his term of probation to expire in February of 2013. A violation report was filed on January 19, 2011 and the Respondent subsequently issued a capias warrant on March 24, 2011. That warrant was

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not ultimately served until April 2013, only two months after the alleged expiration of the Relator's probation, but after Relator had absconded, and a hearing was immediately scheduled once he was returned to Taney County. Between March 24, 2011 and April 2013, no hearings were held, and could not be held due to the Relator's absence. Additionally, the Taney County Jail (not the Court) was not made aware of the Relator's location until November 26, 2012. As previously stated, for reasons unknown, the Relator was not transported by the Taney County Sheriff's Department or its representatives from DOC, while serving time on another charge that the Relator was convicted of while he was on probation in the instant case, and was not picked up after his release from DOC, also for reasons unknown and beyond the Respondent's control. Based on the Relator's own exhibits and evidence presented, the Relator was clearly aware that there was a warrant out for his arrest and never made an effort to turn himself in to the authorities nor did he make an attempt to contact the Court after his release from DOC until his arrest by the New Madrid Police Department in April of this year, while he was declared an absconder from probation and parole during a period from January to April 2013. The Respondent never had an opportunity to conduct the probation violation hearing. Given the totality of the circumstances, the Relator's own actions, a delay of two months was not unreasonable and was not unduly prejudicial to the Relator.

RELATOR WAS AWARE OF THE VIOLATION AND HAD SEVERAL OPPORTUNITIES TO RESOLVE THE ISSUE, BUT FAILED TO DO SO

The Relator was aware of his probation before the Respondent and was also aware that there was a warrant out for his arrest for violating his probation, based on documents

produced and filed by the Relator himself. (Rel. Ex. D). Given the Relator's knowledge of the situation, he could have moved to resolve the issue himself, but failed to do so. As stated by the Respondent in the hearing on Relator's "Motion to Discharge from Probation", the Relator could have done several things to have the hearing conducted while in the Department of Corrections – a position he had put himself in by committing a new crime while on probation: he could have filed a request for a hearing to be conducted through the Polycom video conferencing system. (Rel. Ex. C, p. 16). The Relator would have had to initiate this process himself, as he is the only one who can waive his personal appearance before the Court. Mo. Const. Art. I Sec. 18(a). Additionally, as previously stated the Relator could have simply reported to the Court rather than absconding from probation in January 2013.

CONCLUSION

Respondent has attempted to conduct the Relator's probation revocation hearing in a timely manner, however the hearing could not be conducted due to circumstances beyond the Respondent's control, including Taney County's failure to transport the Relator from DOC and the Relator's subsequent actions of absconding from probation and parole. The reasonable delay in the Relator's case is not unduly prejudicial, as the delay was essentially caused by the Relator himself. The Relator's failure to take any actions, such as turning himself in on the outstanding warrant which he knew was out for his arrest, by failing to report to his probation officer and by failing to attempt to resolve his probation violation while he was in DOC, show that the delay was self-inflicted. The

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Relator has failed to meet his burden of proof in showing that there was an unreasonable delay that was unduly prejudicial.

THEREFORE it is prayed that this Court will enter an order quashing its preliminary writ and any other orders in furtherance of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 30th day of August, 2013, true and correct copies of the foregoing brief were delivered to James Egan, attorney for the Relator, through the Missouri eFile system.

/s/ Anthony M. Brown
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CERTIFICATE OF COMPLIANCE

I, Anthony Brown, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using a combination of Microsoft Word 2007 and Microsoft Word 2011 for Mac, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 2,776 words, which does not exceed 27,900 words, the maximum allowed for a Respondent's brief.

/s/ Anthony M. Brown
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